HON. ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FALCON ENTERPRISES, INC., *et al.*,

Plaintiffs,

vs.

CENTURION LTD., *et al.*,

Defendants.

Case No.: CV 07-0065 RSL

PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION TO SET ASIDE DEFAULT OF DEFENDANTS BIZMEDIA, INC. AND GEORGE DUANE DRANICHAK

NOTED ON MOTION CALENDAR: JUNE 1, 2007

COME NOW the Plaintiffs Falcon Enterprises, Inc. and Falcon Foto, LLC (collectively "Falcon"), by and through their counsel of record, and hereby submit their Response in Opposition to Motion to Set Aside Default of Defendants Bizmedia, Inc. and George Duane Dranichak and state as follows:

I. INTRODUCTION

Defendants Bizmedia, Inc. ("BizMedia") and George Duane Dranichak ("Dranichak")(collectively "Moving Defendants") have filed their Motion to Set Aside Default of Defendants of Defendants BizMedia, Inc. and George Duane Dranichak (the "Motion") pleading that they have "meritorious defenses" against Plaintiffs' claims, that Plaintiffs will not be prejudiced by vacating the Defaults, and that they did not engage in "culpable conduct." In

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doing so, the Moving Defendants assert that they "were unable to secure representation and defend the action within the twenty (20) day period prescribed by Fed. R. Civ. P. 12(a)(1)(A). Motion at 1:28 - 2:2. Moving Defendants further state that they "have now appeared in the action through their undersigned counsel and are prepared to file a Motion to Dismiss…" *Id.* at 2:2-4.[1]

II. FACTS

Under the guise of "facts," Moving Defendants apparently attempt to lay the ground-work for their arguments to dismiss pursuant to Fed. R. Civ. P. 12. In doing so, the Moving Defendants intentionally misstates Falcon's First Amended Complaint ("FAC") wherein the Moving Defendants aver that "Falcon admits that it issued a license to Bizmedia, Inc. *authorizing the use of some of the images at issue in this case.*" Motion at 3:4-5 (emphasis added). In doing so, Moving Defendants refer this Honorable Court to paragraph 14 of the FAC. In fact, what paragraph 14 of the FAC states, in relevant part, is, "A license authorizing the use of some of Falcon's images was issued to Bizmedia, Inc. on September 29, 2002. *None of the Web sites for which license was issued are the Web sites that are the subject of this lawsuit.*" This is but the first of the Moving Defendants misstatements of material facts and law and omissions of material facts and law that are offered to this Honorable Court in the Motion.

Moving Defendants further aver that "Mr. Dranichak is an individual residing in Ontario, Canada and was an independent sales agent of Defendant Centurion." Motion at 3:2-3. What the Moving Defendants omit from their pleading is that Mr. Dranichak was served in his individual capacity *and* also served as an officer and director of Defendant Uncaged Marketing, Inc. *at the very same moment. See* Dkt. #s 19-20. What Moving Defendants utterly fail to explain is how Defendant Uncaged Marketing was able to obtain representation in such a timely

[1] Plaintiff observes with no insignificant degree of incredulity that the Moving Defendants' "undersigned counsel" are **the very same counsel** that represent Defendant Centurion, Ltd., who opposed Plaintiffs' Motion for Entry of Default (Dkt. # 30) and who this Honorable Court held had no standing to oppose Plaintiff Falcon's Motion for Entry of Default Against the Moving Defendants. Dkt. #s 34-35.

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manner that permitted it to avoid an Entry of Default, yet somehow couldn't obtain personal representation at the same time.

III. ARGUMENT AND AUTHORITY

Moving Defendants argue that "Vacating default orders is favored by the Ninth Circuit Court of Appeals," and that "Courts in the Ninth Circuit look to three factors in determining whether 'good cause' under Fed. R. Civ. P. 55(c) is satisfied. Those factors are:

(i) whether the defendant has a meritorious defense;
(ii) whether reopening the default would prejudice the plaintiff; ***and***
(iii) whether the defendant's culpable conduct les to the default."

(quoting *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984) and *Alan Neuman Prods., Inc. v. Albright*, 862 F.2d 1388, 1392 (9th Cir. 1988)). However, Moving Defendants do not reveal that a court need not consider the "meritorious defense" or "prejudice" prongs of the test if culpable conduct is shown. Conduct is culpable if the defendant has received *actual or constructive notice of the filing of the action* and fails to answer. *Alan Neuman Prods., Inc. v. Albright*, 862 F.2d 1388, 1392 (9th Cir. 1988) (citations omitted), *cert. denied*, 493 U.S. 858, 107 L. Ed. 2d 124, 110 S. Ct. 168 (1989).

In fact, Moving Defendants materially misstate the standard set forth by the Ninth Circuit. "A court has discretion to deny a motion to vacate a default judgment under Rule 60(b) if: (1) the plaintiff would be prejudiced by setting aside the judgment; (2) the defendant has no meritorious defense; ***or*** (3) the defendant's culpable conduct caused the default." See *Hammer v. Drago*, 940 F.2d 524, 525-26 (9th Cir. 1991)(emphasis added). Any single factor is sufficient to justify a court's denial of the Rule 60(b) motion. *See id.* at 526. The same general grounds for relief apply to both Rule 55(c) and Rule 60(b) motions. See *Hawaii Carpenters' Trust Funds v. Stone*, 794 F.2d 508, 513 (9th Cir. 1986). If a default judgment is entered as the result of a defendant's culpable conduct, this Honorable Court need not consider whether a meritorious defense was shown, or whether the plaintiff would suffer prejudice if the judgment were set aside. *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984) (per curiam); *Benny v. Pipes*, 799 F.2d

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489, 494 (9th Cir. 1986); *Bluegrass Bit Co. v. Minelli*, 1991 U.S. App. LEXIS 14805 (9th Cir. 1991)("A party's conduct is culpable if it "has received actual or constructive notice of the filing of the action and failed to answer."); *Chums, Ltd. v. Always In Mind*, 1997 U.S. App. LEXIS 5525 (9th Cir. 1997)("This three-part analysis is a disjunctive one; a finding of one of the three factors can be sufficient to justify a district court's denial of a motion to vacate a default judgment. Id. (citing *Cassidy v. Tenorio*, 856 F.2d 1412, 1415 (9th Cir. 1988))); *Meadows v. Dominican Republic*, 817 F.2d 517, 521 (9th Cir. 1987) (holding conduct is culpable if defendant receives actual or constructive notice of the filing of the action but fails to answer); *Pacific Int'l Airlines v. Caprel Enters.*, 1998 U.S. App. LEXIS 20662, 2-3 (9th Cir. 1998)(not an abuse of discretion to deny motion to set aside the default judgment and the motion for reconsideration because it was undisputed that defendant received actual notice of Plaintiff's filing of the action, and failed to answer the complaint).

In the instant case, the Moving Defendants mislead this Honorable Court by pleading that the three factors to be considered in a motion to vacate a default must be read in the conjunctive. However, as the Plaintiffs have shown, and as the Ninth Circuit has held, these factors must be read in the disjunctive. Plaintiff Falcon need not prove that the Moving Defendants do not have a meritorious defense. Neither must Falcon prove that they will be prejudiced by a vacation of the entries of default. The Moving Defendants received actual notice of the filing of the First Amended Complaint and failed to answer.[2] Simply because the Moving Defendants are located outside of the United States and allege to have "no relationship with the State of Washington" does not, as they contend, provide a "credible reason for why they did not timely file a responsive pleading." Motion at 8:11-13. Mr. Dranichak was served with the initial Complaint on January 17, 2007, and was served with the First Amended Complaint on April 3, 2007.

[2] Moving Defendants go to great lengths in their Motion to lay an initial foundation of facts and argument that curiously mimic the averred facts and argument found in Defendant Centurion's Motion to Dismiss. *See* Motion pp. 5-7. However, Moving Defendants' arguments are of no moment and, notwithstanding the protestations of the Butler in *The Hunting of the Snark*, saying a thing three times does not necessarily make it true.

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Moreover, as the pleadings in this case clearly reveal, Uncaged Marketing (a foreign defendant of which Mr. Dranichak is both an officer and director, and upon whom service was effected by serving Mr. Dranichak in that capacity) was able to obtain representation in a timely fashion. For Mr. Dranichak to now contend that he was unable to obtain representation by the very counsel who attempted to oppose Plaintiffs' Motion for Entry of Default flies in the face of common sense.

Defendant BizMedia similarly was served on April 3, 2007 and in the very same office, and to the very same individual who was served with the First Amended Complaint naming Defendant Centurion, Ltd. (curiously, in the very same building and on the very same floor as Defendants Uncaged Marketing and Dranichak).

IV. CONCLUSION

Moving Defendants have attempted to mislead this Honorable Court by misstatements of material fact and egregious misstatements of the law. The Moving Defendants represent that they have license for the images that are at issue in this case, yet which is unequivocally disputed by the plain-language of the First Amended Complaint. The Moving Defendants omit the fact that Mr. Dranichak is both and officer and director of Defendant Uncaged Marketing, Inc. and misdirect this Honorable Court into believing that he is only an "independent sales agent of Centurion" (who is not a party to this Motion). The Moving Defendants misstate the standard set forth by the Ninth Circuit by combining the three prongs of consideration required of the Court in considering a motion to vacate pursuant to Fed. R. Civ. P. 55(c) by stating them in the *conjunctive*, while the weight of the Ninth Circuit decisions on the question unambiguously state that the prongs are to be considered in the *disjunctive.* The Moving Defendants further fail to reveal in candor to this tribunal that a failure to respond to a complaint where actual (or even constructive) notice is given to a defendant of the pendency of a lawsuit constitutes the third prong of the test (culpable conduct) and that culpable conduct of this nature is *the only* test that this Honorable Court need to consider in denying the Moving Defendants Motion.

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The Moving Defendants were provided actual notice of the pendency of this lawsuit, yet they utterly failed to respond in the time set forth in the Federal Rules of Civil Procedure compelling the filing of a responsive pleading.

The Moving Defendants incompletely state, and thereby mislead this tribunal, in the holdings in *Falk v. Allen* and *Alan Neuman Prods., Inc. v. Albright*, the very cases they set forth as authority for their argument.

For all these reasons, Defendants Bizmedia, Inc.'s and George Duane Dranichak's Motion to Set Aside Default must be denied.

DATED this 28th day of May 2007.

Respectfully submitted,

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s/ *Robert S. Apgood*
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CERTIFICATE OF SERVICE

I, Spencer D. Freeman, do hereby certify that on the 29th day of May 2007, I caused true and correct copies of the following:

1. Plaintiff's Response In Opposition to Motion to Set Aside Default of Defendants Bizmedia, Inc. and George Duane Dranichak; and
2. this Certificate of Service

to be served on:

Derek A. Newman, Roger M. Townsend. Newman & Newman. 505 Fifth Ave. S. Ste. 610. Seattle, WA 98104

And

Venkat Balasubramani, Balasubramani Law, 8426 40th Ave SW, Seattle, WA 98136,

by filing a copy of the same with the Clerk of the Court using the court's CM-ECF system. By the terms of their agreement and the rules of the court, they will be served with a copy of the same via the CM-ECF system.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed at Seattle, Washington,

DATED this 28th day of May 2007.

FREEMAN LAW FIRM, INC.

By:_s/ Spencer D. Freeman_____
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